FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

OSCAR MAYER & CO., ET AL., PETITIONERS

v.

JOSEPH W. EVANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

FRANK H. EASTERBROOK
Deputy Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

DONALD S. SHIER
Associate Solicitor

DENNIS D. CLARK
Deputy Associate Solicitor

PAUL D. BERNIER
Attorney
Department of Labor
Washington, D.C. 20216

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether Section 14(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633(b), requires an aggrieved person to resort to available state remedies before bringing suit under Section 7(c) of the Act, 29 U.S.C. 626(c).

INTEREST OF THE UNITED STATES

The Age Discrimination in Employment Act ("ADEA") was designed to "promote employment

of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (29 U.S.C. 621(b)). The Secretary of Labor is responsible under the Act for investigating complaints of age discrimination in employment and attempting to eliminate "through informal methods of conciliation, conference, and persuasion" practices that violate the Act (29 U.S.C. 626(a) and (b)). The Secretary may bring suit for appropriate relief if the conciliation process fails (29 U.S.C. 626(b)). The ADEA also authorizes private actions by "[a]ny person aggrieved" because of age discrimination in employment (29 U.S.C. 626(c)). Such private suits are important adjuncts to the Secretary's enforcement efforts.

The Act's scope is broad,[1] and it generates a correspondingly large volume of age discrimination complaints. For example, the Secretary filed 86 suits during 1977, and in that year at least 433 private enforcement actions were filed in the federal district

[1] The ADEA applies to any employer with 20 or more employees in any industry affecting interstate commerce. It applies also to recruiting, advertising and referrals by employment agencies serving covered employers, and to specified actions by unions that have 25 or more members and represent or seek to represent the employees of such employers. 29 U.S.C. 623, 630. As enacted in 1967, the Act protected persons between 40 and 65 years of age. 29 U.S.C. 631. The Act's protections now have been extended, for most purposes, to persons between 40 and 70 years of age. Pub. L. No. 95-256, Section 3, 92 Stat. 189-190.

courts.[2] By providing an effective alternative to suits by the Secretary, private enforcement actions free the Secretary to devote his efforts to cases of significant precedential value and to those arising out of company-wide patterns and practices. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).

Questions concerning the procedural requirements of the Act have diminished the effectiveness of private enforcement actions. A substantial percentage of the reported private actions under the ADEA have been dismissed on grounds relating at least in part to procedural prerequisites to suit. Many persons with colorable substantive claims are not sophisticated in the ADEA's procedural rules, and forfeiture of rights has become common. The Secretary is concerned that the effectiveness of private proceedings not be diminished by interpretations of procedural rules that make them traps for the unwary. See *Love* v. *Pullman Co.*, 404 U.S. 522, 526-527 (1972). The Secretary also is concerned the Act's procedural prerequisites not be interpreted to compel the Secretary to resort to state proceedings before he may file suit. The United States therefore has a substantial interest in this case.

STATEMENT

1. The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634, as amended by Pub. L. No.

[2] Department of Labor, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1977* 25 (1978).

95-256, 92 Stat. 189, prohibits most employers from discriminating against employees between the ages of 40 to 70 on the basis of age.[3] Under 29 U.S.C. 626 (b), the Act is administered by the Secretary of Labor and is "enforced in accordance with the powers, remedies, and procedures provided in" the Fair Labor Standards Act, 29 U.S.C. 211(b), 216, 217. See *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

A person who believes that he has been treated unlawfully may bring suit for appropriate legal or equitable relief. 29 U.S.C. 626(c). Before doing so, however, he must give notice of his intent to file such a suit to the Secretary of Labor no later than 180 days after the alleged unlawful practice, and he cannot sue until at least 60 days after he gives such notice. 29 U.S.C. 626(d).[4] The Act requires the Secretary, when notified of an employee's intent to sue, to attempt resolution of the problem by informal methods of "conciliation, conference, and persuasion." 29 U.S.C. 626(d).

If the problem is not resolved during the 60 days, either the employee or the Secretary may bring an action for relief. 29 U.S.C. 626(b), (c), (d). A

[3] The Act provides exceptions where age is a bona fide occupational qualification, and it does not prohibit action taken pursuant to a bona fide seniority system or employee benefit plan. 29 U.S.C. 623(f), as amended by Pub. L. No. 95-256, 92 Stat. 189.

[4] In 1978 the Act was amended to require the employee to file with the Secretary a "charge alleging unlawful discrimination," rather than a notice of intent to sue. The time limits remain unchanged. Pub. L. No. 95-256, Section 4, 92 Stat. 190. See also note 5, *infra*.

suit by the Secretary terminates the right of the employee to sue in his own name. 29 U.S.C. 626(c). The Act adopts the statute of limitations from the Fair Labor Standards Act, and thus a suit cannot be filed more than two years after the alleged unlawful practice (three years if the practice is allegedly willful). 29 U.S.C. 626(e); see 29 U.S.C. 255.

If the events in question occur in a state that has both a law prohibiting age discrimination and a state authority than can grant or seek relief from such discrimination, "no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated * * *." Section 14(b), 29 U.S.C. 633(b).[5] Any action brought under the ADEA "supersede[s] any State action," however, 29 U.S.C. 633(a).

2. Respondent was employed by petitioner Oscar Mayer & Co. for 23 years, until his involuntary retirement in Iowa on January 31, 1976 (A. 4).[6] The "retirement" took place under threat of dismissal;

[5] "[I]n a case to which section 633(b) * * * applies," the employee's notice of intent to sue must be given to the Secretary within 300 days of the alleged discrimination (rather than the 180 days otherwise provided), or within 30 days after the employee is notified that proceedings under state law have been terminated, whichever date is earlier. 29 U.S.C. 626 (d)(2).

[6] The facts of this case are found in the complaint (A. 3-6). Because this case was certified by the district court for an interlocutory appeal before petitioners even filed an answer, the allegations of the complaint must be accepted as true.

Oscar Mayer removed respondent in this way solely because of his age and not because of any deficiency in performance of his job (A. 4). On March 10, 1976, respondent filed with the Secretary a notice of intent to sue, asserting that his dismissal violated the ADEA (A. 5). The Department of Labor attempted to resolve the dispute without litigation, but these efforts failed. Respondent filed this action in the United States District Court for the Southern District of Iowa on March 7, 1977, slightly less than one year after his notice to the Secretary.

Iowa has a statute prohibiting discrimination in employment based on age (Iowa Code Ann. § 601A.6 (1)(a) (West 1975). The statute authorizes the Iowa Civil Rights Commission to investigate complaints alleging such discrimination and to order reinstatement or other appropriate relief where warranted (*id.* at § 601A.14). Respondent did not seek relief from that Commission before filing this action (Pet. App. A2).

Petitioners moved to dismiss the complaint for lack of jurisdiction (A. 7), arguing that 29 U.S.C. 633 (b) required respondent to resort to Iowa's remedies before filing suit under the Act (see Pet. App. A1). The district court held that "such resort is not a mandatory or jurisdictional prerequisite to the filing of an ADEA suit in federal court" (Pet. App. A6) and denied the motion.

A divided panel of the court of appeals reversed,[7]

[7] The district court certified its ruling for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals allowed the appeal (Pet. App. A16).

holding that respondent should have sought relief from Iowa authorities but that his failure to do so might be excused if there were extenuating circumstances. It remanded for the district court to consider the question of excuse (Pet. App. A12-A13). The panel then granted rehearing, withdrew its first opinion, and affirmed the district court's order (Pet. App. A15-A21). Relying on *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), petition for cert. pending, No. 78-1, the panel concluded that the Act does not require an aggrieved person to seek relief from a state agency prior to filing suit, and it held that "such an individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency" (Pet. App. A19).

SUMMARY OF ARGUMENT

Most of the procedural provisions of the Age Discrimination in Employment are drawn from the Fair Labor Standards Act ("FLSA") (see generally *Lorillard* v. *Pons*, 434 U.S. 575 (1978)), because Congress was dissatisfied with the bureaucratic delays and procedural hurdles encountered in enforcement of Title VII of the Civil Rights Act of 1964. But Congress did adopt one feature of Title VII: a requirement of some resort to the administrative process prior to suit. The central question in this case is whether Section 14(b) of ADEA, 29 U.S.C. 633(b), parallels the provision of Title VII that has

been understood as requiring resort to available state remedies.

The language of Section 14(b) can be read to mean either (a) that every person must commence state proceedings and then wait 60 days before filing a federal suit, or (b) that, if any person commences state proceedings, he must give the state agency 60 days to work on his case before filing suit. The structure of ADEA demonstrates that Congress intended the latter interpretation.

Unlike the conciliation process of Title VII, Section 14(b) of ADEA does not provide a waiting period before federal assistance can be sought. A charge can be filed with federal officials without regard to the invocation of state procedures; the 60-day provision is a delay only on filing suit. Furthermore, persons who think it to their advantage to resort to state remedies will do so regardless of whether that is compelled by Section 14(b); those who do not think that it is to their advantage are not bound to cooperate with state officials, even if prior resort to state processes are required, and by hypothesis they are not likely to do so. If resort to state remedies is required, an aggrieved party who withholds cooperation can make the state proceedings meaningless, and state agencies will have little incentive to devote their limited resources to 60 days' worth of conciliation in cases involving these persons. It is therefore most unlikely that petitioners' construction of the statute would enhance the usefulness of the administrative process or lead to settlements that

could not be achieved as easily through private negotiation or by conciliation through the Department of Labor.

The legislative history of ADEA demonstrates skepticism about the efficacy of age discrimination laws in effect in 24 states at the time ADEA was enacted. There is no mention in the legislative history by any Member of Congress that Section 14(b) would require resort to state remedies. Ten years after passage of ADEA, the 95th Congress thoroughly reviewed the Act and its administration. The Senate committee, in a discussion adopted by the conference committee, expressly stated that Section 14(b) "does not require that the individual go to the State first in every instance" and that judicial decisions requiring such resort were erroneous. S. Rep. No. 95-493, 95th Cong., 1st Sess. 6-7 (1977). This legislative history supports our reading of the statute.

Finally, ADEA is remedial legislation, entitled to be liberally construed, especially where, as here, there is danger of creating traps for the unwary and procedural bars to the consideration of otherwise meritorious suits.

If, contrary to our submission, the Court should conclude that Section 14(b) requires every person to resort to available state remedies, it should remand the case for a determination whether respondent's neglect may be excused, in light of his argument that he relied on advice from the Department of Labor that resort to state remedies was not required under ADEA.

ARGUMENT

I

THE ADEA DOES NOT REQUIRE AN AGGRIEVED PERSON TO RESORT TO STATE REMEDIES BEFORE FILING SUIT IN FEDERAL COURT

A. Introduction

The Age Discrimination in Employment Act is an amalgam of provisions drawn from other statutes. Most of the substantive provisions were drawn from Title VII of the Civil Rights Act of 1964, but most of the procedural provisions were drawn from the Fair Labor Standards Act ("FLSA"). See generally *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

The mixture was intentional. When Congress enacted the ADEA in 1967, it already was dissatisfied with the sluggish pace of proceedings under Title VII. The initial proposed bill,[8] which borrowed enforcement provisions from Title VII and the National Labor Relations Act, met with substantial opposition from legislators who feared that the establishment of another bureaucracy and the employment of Title VII and NLRA procedures would produce "the same delays which plague * * * the EEOC and the NLRB." 113 Cong. Rec. 7076 (1967) (Sen. Javits). Senator Javits, the principal sponsor of the age discrimination legislation (see S. Rep. No. 723, 90th Cong., 1st Sess. 13 (1967)), characterized these procedural stumbling blocks as "always unfortunate, but

[8] S. 830, 90th Cong., 1st Sess., 113 Cong. Rec. 2795 (1967).

* * * particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967).

Senator Javits therefore proposed that Congress incorporate the procedures of the FLSA, 29 U.S.C. 201 *et seq.*, which relies for enforcement exclusively on suits brought by aggrieved persons and the Secretary of Labor. "By utilizing the courts [directly] * * * as the forum to hear cases arising under the law," it was hoped that the problems of delay and procedural roadblocks could be "largely avoided." 113 Cong. Rec. 7076 (1967). The nearly identical House and Senate bills that became the ADEA adopted Senator Javits' approach. See S. 830, 90th Cong., 1st Sess., Section 7 (1967); H.R. 13054, 90th Cong., 1st Sess., Section 7 (1967). See also 113 Cong. Rec. 35055 (1967) (Sen. Yarborough, the bill's manager).

The enforcement provisions thus designed for the ADEA relieved complainants of many of the procedural requisites of Title VII actions. For example, the ADEA omitted any requirement that an agency find reasonable cause as a prerequisite to suit (compare 42 U.S.C. (1964 ed.) 2000e-5(a) and (e)), and omitted with it any requirement of prompt suit after receiving an administrative determination (compare 42 U.S.C. 2000e-5(d)). There were many other changes as well, some of which are discussed in this Court's opinion in *Lorillard* v. *Pons*, *supra*.

But Congress adopted for the ADEA one feature modeled after Title VII's procedures: a requirement

of some resort to the administrative process prior to suit. An aggrieved person must file a complaint with the Secretary of Labor, and the statute gives the Secretary 60 days to attempt to achieve settlement of the dispute by informal methods. 29 U.S.C. 626 (b) and (d).

Congress also desired state agencies to play a role in the conciliation process. Section 14 of the ADEA, 29 U.S.C. 633, permits state and federal administrative proceedings to continue simultaneously. Section 14(b), 29 U.S.C. 633(b), the center of contention in this case, provides that if a state has a statute prohibiting age discrimination and a state agency that can grant or seek relief from such discrimination, then "no suit may be brought under [the ADEA] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated * * *." The parallel provision of Title VII, 42 U.S.C. 2000e-5(c), has been understood as requiring a request for available relief from a state agency before the EEOC may consider a charge of discrimination. See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).[9] The

[9] The construction of 42 U.S.C. 2000e-5(c) has been justified by the legislative history of Title VII, which reveals an unmistakable congressional intent to require aggrieved persons to seek available relief from state agencies in the first instance. *Dubois* v. *Packard Bell Corp.*, 470 F.2d 973, 975 (10th Cir. 1972) (the legislative history of Title VII is "so manifestly clear as to remove all doubt" on this score); cf. Pet. Br. 12 (quoting remarks of Sen. Humphrey). As we show at pages 21-23, *infra*, the legislative history of the ADEA is otherwise.

central question in this case, then, is whether the parallel to the Title VII procedures holds.

Certainly the language of Section 14(b) does not compel the conclusion that every aggrieved person must resort to any available state remedy. The statute can be read to mean either (a) that every person must commence state proceedings and wait 60 days before filing a federal suit,[10] or (b) that if any person voluntarily commences state proceedings, he must give the state agency 60 days to work on his case before commencing a federal suit.[11] The statute does not preclude either of these readings.

In our view, the most important guide to the meaning of Section 14(b) is the way in which the provisions of the ADEA relate to one another. Section 14 is different in important ways from the comparable provision of Title VII, so that what makes sense under Title VII would be useless under the ADEA. We turn to a discussion of these differences.

[10] Two courts of appeals have adopted this reading of the statute. See *Reich* v. *Dow Badische Co.*, 575 F.2d 363 (2d Cir. 1978); *Curry* v. *Continental Airlines*, 513 F.2d 691, 693 (9th Cir. 1975) (dictum).

[11] Three courts of appeals have adopted this reading. In addition to the decision in the instant case, see *Holliday* v. *Ketchum, MacLeod, & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc), overruling *Goger* v. *H. K. Porter, Inc.*, 492 F.2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), petition for cert. pending, No. 78-1. See also Comment, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457, 475-480 (1977), which supports this view.

B. The structure of the ADEA establishes that aggrieved persons need not resort to state procedures

1. *Section 14 does not defer to state procedures, and the short time limits of the Section would make involuntary use of state procedures futile*

As petitioners emphasize (Br. 8-10), resort to state procedures before commencing suit in federal court may lead to settlements and compromises, thus reducing the need for litigation and alleviating court congestion. It is unquestionably true that settlement is preferable to litigation, both because it is quicker and because it uses less of the courts' scarce resources. This consideration supplies much of the force behind petitioners' argument.

The structure of Title VII emphasizes settlement and gives to the conciliation process a prominence that encourages settlement. Under 42 U.S.C. 2000e-5(c) an aggrieved person cannot file a complaint on which the EEOC can act until he first has sought relief from state agencies, if such relief is available. During this initial period, then, the state agency has exclusive jurisdiction to seek conciliation. Once the 60 days of exclusive jurisdiction have expired, the EEOC can process and mediate the claim. Now two agencies are allowed to negotiate; the statute still forbids suit. The conciliation process begun by the state agency during its period of exclusive jurisdiction can continue. The aggrieved person cannot file suit until the EEOC issues a formal notice of right

to sue.[12] And even if a suit is filed the state's administrative process can continue. This statutory plan gives conciliation ample time to succeed, and it gives the state agency a period of exclusive authority before federal powers are invoked.

The structure of Section 14 of the ADEA is significantly different. Although a person who seeks relief from a state agency must wait 60 days, the waiting period is *not*—as it is under Title VII—a wait before filing a charge with federal officials. The charge with federal officials can be filed at any time within 180 days after the alleged discrimination, without regard to the invocation of state procedures. 29 U.S.C. 626(d).

It is thus unquestionably true, as several courts have emphasized, that the ADEA reflects considerably less deference to state procedures than does Title VII.[13] More than that, however, the differences

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[12] The EEOC now must issue this notice within 180 days of the filing of the charge. 42 U.S.C. 2000e-5(f)(1). Its regulations permit earlier notice under some circumstances. Under the provisions of Title VII that were in effect when the ADEA was enacted, however, the EEOC could not issue this notice until mediation had failed or it found probable cause to believe that there had been discrimination. 42 U.S.C. (1964 ed.) 2000e-5(a) and (d). This process could take years, and the difference between the ADEA and Title VII must be considered in light of the provisions of Title VII that were in effect when the ADEA was enacted. In 1967 the Title VII process could require conciliation under both state and federal agencies to continue for a substantial time before suit was filed, thus giving the state agency time to ascertain the facts and make extended efforts. Under ADEA the mandatory wait before suit never has exceeded 60 days.

[13] See the cases cited in note 11, *supra*.

between Title VII and the ADEA make compulsory resort to state procedures under the ADEA futile.

To see why this is so, assume that there are two types of aggrieved persons: those who would seek state assistance without the compulsion of the ADEA, and those who would not. Those who see advantages in the state process will use it whether or not Section 14 of the ADEA is read to compel that result. These persons presumably will cooperate with the state agencies and assist in the resolution of their grievances. For these persons the administrative process is likely to be helpful, if pursued to completion. Section 14(b) serves a valuable purpose by requiring persons who have invoked state remedies to continue to pursue them for at least 60 days; in other words, for this class of persons, Section 14(b) guards against a too-quick change of mind that could undermine the administrative process almost before it gets underway.

Those who do not see advantages in the state procedures will not invoke them unless required to do so by federal statute. Presumably these are the persons about whom petitioners profess concern. But it is most unlikely that, given the structure of the ADEA, a requirement that these persons file a state complaint against their will would do the slightest good. Nothing in the ADEA requires an aggrieved party to cooperate with the state agency; it is unlikely that the class of persons who do not see advantages in the state process will cooperate extensively. Such cooperation, however, would be essential,

because, even under petitioners' arguments, any person could give the state no more than 60 days to investigate, negotiate, and settle the case to the satisfaction of both the complainant and the alleged wrongdoer. Thus the aggrieved party could make the state proceedings an empty gesture by withholding active cooperation. A state agency ordinarily could not conciliate an age discrimination complaint within 60 days without help from both sides.[14]

It also is important to understand the effect of Section 14(a) on the incentives of state agencies. Because the ADEA allows mediation by state agencies to proceed simultaneously with mediation by the Secretary of Labor, a state agency rationally would choose to devote its resources to those complainants who came voluntarily and cooperated most fully. The agency would choose to leave other cases to the Secretary and the courts.

In sum, the structural differences between Title VII and the ADEA demonstrate that it would be futile to read the latter as requiring every complainant to resort to state procedures. Under Title VII the state procedure has time to work; no suit can be filed until the EEOC issues a notice of right

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[14] Some complaints might be capable of resolution within 60 days even without much help from the complainant. But these would be simple complaints or ones in which the alleged wrongdoer promptly admitted error. It is fair to suppose that these cases could be settled as easily and as quickly by informal contacts between complainant and employer, or through the auspices of the Department of Labor, without the need for a state agency.

to sue; even if a suit is filed, the state can continue to attempt to resolve the dispute. Under Title VII, then, complainants have incentives to cooperate with state agencies, and the agencies have incentives to devote enough time and energy to particular cases to produce settlements. Under the ADEA the state procedure has but 60 days to work; suit can be filed long before conciliation has been given a fair chance. Under the ADEA complainants who do not see advantages in the state procedures have no incentive to cooperate with state agencies, and the agencies have little or no incentive to devote their resources to the conciliation of such cases. It is therefore most unlikely that petitioners' construction of the statute would enhance the usefulness of the administrative process or lead to settlements that could not be achieved as easily by private negotiation or by conciliation through the Department of Labor.

We therefore submit that Section 14(b) should be understood to apply only to those persons who voluntarily take their complaints to state agencies. The statute means that a person who invokes the state's process must give the state at least a brief time to deal with his complaint before filing suit. If after 60 days the complainant is dissatisfied with the way things are going, however, he can opt out and pursue his federal remedy.

2. The provision for suits by the Secretary of Labor establishes that resort to state remedies is unnecessary

There is another reason, supplied by the structure of the ADEA, why Section 14(b) should not be read to require resort to state remedies in every case. Section 7(b) of the ADEA, 29 U.S.C. 626(b), incorporates several provisions of the Fair Labor Standard Act, including provisions allowing the Secretary to bring suit on behalf of any aggrieved person. Section 7(c) provides that a suit by the Secretary terminates the right of the complainant to sue on his own behalf. Section 7(b) qualifies the FLSA procedures only by requiring the Secretary first to "attempt to eliminate the [alleged] discriminatory practice * * * and to effect voluntary compliance * * * through informal methods of conciliation, conference, and persuasion."

Section 14(b), however, applies its 60-day deferral period to all suits; it does not distinguish between suits filed by private persons and suits filed by the Secretary. If, as petitioners contend, Section 14(b) requires resort to state remedies as a precondition to suit in every case, then the statute likewise would appear to require the aggrieved party to seek relief from the states before the Secretary can sue. That interpretation is demonstrably contrary to the provisions of the FLSA that the ADEA expressly incorporates.

Between 1949 and 1961 the Secretary was not authorized to bring a suit against an employer under the FLSA to secure the statutory minimum wages or

overtime compensation unless the employee specifically requested the Secretary to do so. 29 U.S.C. (1958 ed.) 216(b). Congress removed that restriction in 1961 (75 Stat. 74) after finding that "[t]his limitation has impeded the Secretary in his efforts to enforce the act since many * * * are hesitant about requesting legal action against their employers." S. Rep. No. 145, 87th Cong., 1st Sess. 20 (1961). The statute now allows the Secretary to sue without regard to the employees' requests or other actions.[15] 29 U.S.C. 216(c). It was this new, and independent, right to sue that Congress incorporated into the ADEA in 1967.

If the Secretary may not bring suit under the ADEA unless the aggrieved person has first sought relief from a state agency, the Secretary would be dependent once again on private action or inaction, the very limit that Congress pointedly discarded in 1961. Nothing in the legislative history of the ADEA suggests that Congress intended to restrict the Secretary's right to sue in this fashion.

Nor can Section 14(b) reasonably be read to require the Secretary himself to invoke state remedies before bringing a federal suit. Such a requirement has never been part of the FLSA, and, when ADEA was enacted, there were no administrative restrictions of any kind on the Attorney General's authority to bring suit under Title VII. See 42 U.S.C. (1964 ed.) 2000e-6(a); *United States* v. *Masonry Construc-*

[15] See generally *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 532 (3d Cir. 1971).

tion Association, 497 F.2d 871, 875-876 (6th Cir. 1974). Nothing in the legislative history of the ADEA suggests that Congress intended to restrict the Secretary of Labor's access to federal courts. And in the absence of clear evidence of legislative intent, it would be anomalous to require that a federal officer seeking to vindicate federal rights not assert his express statutory authority to file suit in federal court until he has first sought relief from a state administrative agency. Consequently, because the language of Section 14(b) does not distinguish between suits by the Secretary and suits by private persons, it is necessary to construe Section 14(b) to avoid any requirement of compulsory resort by the aggrieved person to the state agency.[16]

C. The legislative history of the ADEA does not suggest that resort to state procedures is mandatory

1. *The 1967 debates*

As we pointed out above, courts have understood the section of Title VII from which Section 14(b) of the ADEA was drawn as requiring an aggrieved party to resort to state remedies first in every instance. They have done so principally because of the clear legislative history supporting that result. There is no similar legislative history for the ADEA.

[16] Once state proceedings have been commenced voluntarily, of course, the 60-day rule comes into play and binds the Secretary as well as the complainant. The Secretary consequently does not file suit under the ADEA within 60 days after a complaint has been filed with a state administrative agency.

Quite the contrary, as the Court held in *Lorillard* v. *Pons*, *supra*, the procedural rules of the ADEA are not copied from Title VII, and the interpretation given to Title VII therefore is not a reliable guide to the interpretation of the ADEA. See 434 U.S. at 584-585. Congress wanted to avoid the procedural niceties and delays that had come to characterize Title VII cases (see pages 10-11, *supra*).

The debates on the ADEA do not demonstrate congressional admiration of state administrative remedies or any desire to make them a mandatory first step. Although by 1967 some 24 states had enacted age discrimination legislation similar to the bills pending in Congress,[17] Senator Javits, the chief sponsor of the ADEA, stated:

> The experience under the State laws has been varied. Unfortunately, most States have not made available sufficient funds or manpower to really make a dent in the problem. However, where forceful attempts have been made, especially in some demonstration projects, great success has been achieved.

113 Cong. Rec. 31254 (Nov. 6, 1967). This mixed review of state efforts was repeated by Rep. Matsunaga, who concluded that "most of these [state] laws are inadequate to bring about effective compliance." *Id.* at 34742. See also the statement of Rep. Dwyer, *id.* at 34752: "[T]hough 24 of the States * * * have laws banning age discrimination, many of the laws have

[17] See H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967).

not been implemented and most of the States lack the resources to assure compliance." The committees that worked on the bills shared this appraisal. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967).

It is unlikely that a Congress with such a dim view of the effectiveness of state efforts wanted to make resort to state remedies necessary in every case, thus increasing the state agencies' caseloads and spreading still thinner their limited resources. It is thus significant that no one mentioned that Section 14(b) would require resort to state remedies.

The omission is telling because the committee reports explicitly observe that the statute would forbid suits until the aggrieved party had given to the Secretary a notice of intent to sue and waited 60 days. The House Committee stated:

> The bill, in section 7, also provides that the Secretary may bring an action to require compliance. As was stated, aggrieved persons may similarly bring actions but a condition precedent to the bringing of an action by an individual, is notice to the Secretary and the elapse of a period of 60 days. This is to allow the Secretary to mediate the grievance.

H.R. Rep. No. 805, *supra*, at 5. The Senate Committee agreed (S. Rep. No. 723, *supra*, at 5):

> The bill now authorizes an individual, as well as the Secretary of Labor, to seek remedies through court action. A condition precedent to the bringing of [an] action by an individual is that he

must give the Secretary 60 days' notice of his intention to do so.

If Congress also meant to require aggrieved persons to resort to state remedies, and to wait 60 days after seeking state relief before filing suit, surely some Member of Congress would have said so.[18]

2. *The 1978 amendments*

The 95th Congress thoroughly reviewed the ADEA and its administration. This review led to the enactment in 1978 of numerous amendments. Pub. L. No. 95-256, 92 Stat. 189. Although Congress did not amend Section 14(b), it examined the decisions construing that Section and stated its view that the statute, as it had been enacted in 1967, does not require resort to state remedies. Consequently, the Senate Committee concluded (S. Rep. No. 95-493, 95th Cong., 1st Sess. 6-7 (1977):

[18] Petitioners rely (Br. 22) on the testimony of Andrew Biemiller, who appeared before the Senate committee and urged adoption of Title VII procedures. But, as the Court has recognized, Congress by and large rejected the suggestion to adopt Title VII procedures. See *Lorillard* v. *Pons, supra*. The remarks of Edward Conway (Pet. Br. 22-23) concerning federal-state relationships are even less precise than Biemiller's; and Congress rejected Conway's advice when it permitted concurrent federal and state administrative procedures (see S. Rep. No. 723, *supra*, at 6; H.R. Rep. No. 805, *supra*, at 6). At all events, these isolated statements by persons who were not Members of Congress provide no guidance in interpreting the 1967 Act, because there is no reason to think that Congress discussed or responded favorably to them. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 & n.20 (1977).

Section 14(b) of the Act provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency empowered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that if an individual chooses to apply for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. The provision does not require that the individual go to the State first in every instance.

Several courts have properly recognized this distinction. [Citations omitted.]

Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that failure to do so requires dismissal of the federal action. [Citations omitted.]

It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual. However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

This discussion could not be clearer. An aggrieved person may choose either state or federal remedies,

and Section 14(b) "does not require that the individual go to the State first in every instance." The Conference Committee agreed with this analysis of the statute (see H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978)), and both chambers adopted the conference report without further amendment to the bill. 124 Cong. Rec. H2278 (daily ed. March 21, 1978); 124 Cong. Rec. S4452 (daily ed. March 23, 1978).

Petitioners argue (Br. 24 n.*) that these congressional remarks, although explicit and adopted without dissent in the course of a revision of the statute, are inconsequential because the statements of one Congress about what another Congress did are not entitled to respect by the courts. If petitioners mean that such discussions are to be evaluated carefully, we agree. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). But if petitioners mean that the considered views of the 95th Congress about the interpretation of a statute passed by the 90th Congress should be ignored, petitioners are wrong.

Two considerations require caution in the use of subsequent legislative history. First, the Members of Congress (or their staffs) who write the subsequent reports may know no more than the courts about the intent of their predecessors. The subsequent legislative history may be produced with little review by knowledgeable legislators and without the reflection that often is necessary to understand the

meaning of statutes. Second, it would be inappropriate to allow Congress to alter the meaning of its statutes by a process that omits obtaining the consent of a majority of each chamber and the assent of the President. There is always some danger that subsequent legislative history may be the work of persons who could not get their views written into law.

But these considerations also suggest that subsequent legislative history may be useful when it reflects the views of persons who were knowledgeable about the original statute and when there is good reason to think that their views are shared by a majority of their colleagues. Subsequent legislative history is most likely to meet these tests when the statements are made in connection with new legislation that become law; then the statements are likely to demonstrate how Congress as a whole views the entire statute as amended. The legislative history can be as important in understanding why (and on what understanding) some provision was *not* amended as it is in understanding the amendments themselves.

The Senate committee report here is valuable under these standards. Six of the 15 members of the Senate committee in the 95th Congress, including Senator Javits, were on the same committee when the ADEA was enacted. All six, and all of their colleagues, joined the report. The statement was adopted by the Conference Committee. It explains the understanding of Congress at a time when the ADEA was thoroughly reexamined and amended to alter

judicial decisions that, in Congress' view, were unfaithful to the 1967 Act.[19] The report explains why Section 14(b) was not amended: because the committees believed the provision to have a particular meaning and because, although the cases were not unanimous, some supported that interpretation. It is fair to assume in these circumstances that the statute would have been amended to conform to the committee's views but for the fact that Congress thought an amendment unnecessary. It is not often that subsequent legislative history is so clear and so likely to be probative. Here, as in other cases, the committee's statement offers a "pertinent" guide to the meaning of the statute. *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968).[20]

* * * * *

[19] For example, the 1978 amendments set aside this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), on which petitioners rely. See H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8 (1978).

[20] See also *International Brotherhood of Teamsters* v. *Daniel*, No. 77-753 (Jan. 16, 1978), slip op. 17 (relying on enactment of a subsequent statute to clarify meaning of securities legislation); *Califano* v. *Sanders*, 430 U.S. 99 (1977) (relying on enactment of 1976 statute to clarify meaning of a jurisdictional statute enacted in 1948); *Commissioner* v. *Bilder*, 369 U.S. 499, 503-504 (1962) (relying on statements of an oversight committee to contradict the apparently clear terms of the statute). Cf. *Hart* v. *United States*, 585 F.2d 1025, 1037-1041 (Ct. Cl. 1978) (Davis and Friedman, JJ., dissenting).

Cases in which this Court has concluded that subsequent legislative statements should not be followed involved much less trustworthy circumstances. For example, in *TVA* v. *Hill*, No. 76-1701 (June 15, 1978), the subsequent comments took

In sum, although the language of Section 14(b) is "admittedly less than a model of clarity" (*Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978), petition for cert. pending, No. 78-1), the statute does not explicitly require an aggrieved person to resort to state remedies before filing a federal suit. Such a precondition has been found in a parallel provision of Title VII, but the procedural rules of the ADEA are sufficiently different from those of Title VII that an unyielding requirement of resort to state administrative procedures would set wheels in motion for little purpose other than "the creation of an ad-

place during the appropriations process rather than during amendment of the substantive statute. In *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958), petitioner relied on 1918 amendments to an act passed in 1863, and the Court observed that this lapse of time made the later statements unreliable. In *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947), the Court found debate on a 1943 statute of little value in interpreting a 1932 statute not only because the 1943 act was a completely different statute but also because the statements in question were those of individual Senators, none of whom was on the committee that drafted the 1932 statute. In *United States* v. *Price*, *supra*, legislative history of the 1954 Internal Revenue Code was deemed a poor ground for the interpretation of the 1939 Code because none of the 1954 statements was sufficiently clear. And in *United Air Lines, Inc.* v. *McMann*, *supra*, 434 U.S. at 200 n.7, on which petitioners rely, the Court disregarded some statements made in connection with the 1977 review of the ADEA not only because they were not part of the 1967 legislative history but also because the Court found them to be flatly inconsistent with statements made in 1967. Here, however, the 1967 history is not inconsistent with the statements on which we rely; indeed, what legislative history there is supports the position we take.

ditional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526-527 (footnote omitted).

The 1967 legislative history does not support the construction petitioners give to the statute, and the history of the 1978 amendments to the ADEA explicitly disavows petitioners' position. The ADEA is "remedial legislation [that] is entitled to be liberally construed," and the courts "should be chary about creating * * * procedural bars which may, at the outset, require the dismissal of otherwise meritorious age discrimination claims." *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1229-1230 (3d Cir. 1978) (en banc). This Court has declined, in another context, to "engraft on [a] statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). See also *Love* v. *Pullman Co.*, *supra*. It should decline petitioners' invitations as well.

II

EVEN IF AGGRIEVED PERSONS SHOULD PURSUE STATE REMEDIES, THAT REQUIREMENT IS NOT JURISDICTIONAL

If, contrary to our submission, the Court should conclude that Section 14(b) requires every person to resort to any available state administrative remedy for age discrimination, it will be necessary to consider whether that requirement sometimes may be excused. The Eighth Circuit's initial opinion, and Judge Bright's opinion dissenting from the court's opinion on rehearing, conclude that any requirement of resort to state procedures "may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute." Pet. App. A21; see also *id.* at A12-A13. Accord, *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977). We agree with this position.[21] Consequently, if the Court should hold that Section 14(b) requires the invocation of state remedies, it should remand for a determination whether respondent's neglect may be excused, rather than for the dismissal of the complaint. The Court also could remand to allow respondent to pursue his state remedies; the district court could hold the case in abeyance while respondent sought state relief.

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[21] The rationale for this position is the same as the justification for judicial tolling of a statute of limitations when necessary to do substantial justice. See *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). See also *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided Court, 434 U.S. 99 (1977), which holds that the failure of an aggrieved person to file with the Secretary a timely notice of intent to sue under the ADEA may be excused in some circumstances. The position also is supported by cases that hold suits in abeyance pending exhaustion of administrative remedies; any requirement of resort to state administrative procedures is more closely related to an exhaustion rule than to a jurisdictional precondition to suit. Cf. *Hayes* v. *Secretary of Defense*, 515 F.2d 668, 675 (D.C. Cir. 1975).

The Court has followed this path in a case under Title VII. In *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 400 U.S. 1004 (1971), the plaintiff filed with the EEOC a charge of discrimination and later filed a federal suit under Title VII. The defendant moved to dismiss the complaint on the ground that the court lacked jurisdiction because the plaintiff has not first resorted to remedies under state law. The court of appeals held that the failure to seek administrative relief from state officials left the district court "without jurisdiction to entertain suit" (422 F.2d 1028, 1032 (9th Cir. 1970)) and accordingly required dismissal without regard to the reasons for plaintiff's neglect. Plaintiff sought review by this Court, and the Solicitor General filed a brief as *amicus curiae* suggesting that the case be remanded to the district court so that it could retain jurisdiction while the plaintiff initiated state proceedings. This Court granted the petition, vacated the judgment, and ordered the case remanded to the district court "for reconsideration in light of [the] suggestion[] contained in the [brief] of the Solicitor General" (400 U.S. at 1004).[22] It should offer respondent

[22] The district court followed the Solicitor General's suggestion (4 F.E.P. Cases 32 (1971)), as did the Ninth Circuit in later cases. *Motorola, Inc.* v. *EEOC*, 460 F.2d 1245, 1246 (9th Cir. 1972); *Parker* v. *General Telephone Co.*, 476 F.2d 595 (9th Cir. 1973); *Oubichon* v. *North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). Accord, *Mitchell* v. *Mid-Continent Spring Co.*, 466 F.2d 24 (6th Cir. 1972), cert. denied, 410 U.S. 928 (1973). See also *Waters* v. *Heublein, Inc.*, 547 F.2d 466, 468 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977); *EEOC* v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 n.3 (9th Cir. 1974).

and the district court in this case a similar opportunity, in light of respondent's argument that "he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor" (Pet. App. A21).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

FRANK H. EASTERBROOK
Deputy Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

DENNIS D. CLARK
Deputy Associate Solicitor

PAUL D. BRENNER
Attorney
Department of Labor

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